SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

No. 13, ORIGINAL.

EX PARTE: IN THE MATTER OF WILLIAM H. GAINES ET AL., PETITIONERS.

RETURN TO RULE.

FILED FEBRUARY 27, 1893.

UNITED STATES OF AMERICA:

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

To the honorable the Chief Justice and associate justices of the Supreme Court of the United States:

Answer of Henry C. Caldwell, judge of the eighth circuit, to the rule served upon him to show cause why a peremptory writ of mandamus should not issue to compel him to enter a certain proposed decree exhibited with the petition of William H. Gaines and others in the case of William H. Gaines and others *vs.* D. C. Rugg, pending in the circuit court of the United States for the eastern district of Arkansas, western division.

Respondent admits that the mandate set forth in the petition herein was filed in said circuit court at the time alleged therein; that the same was duly entered of record at the time alleged; that a petition was filed with said mandate, praying that the specific decree set forth in the exhibit accompanying the same be entered in favor of the petitioners; that the proposed decree is correctly set forth in the exhibit accompanying said petition; that a motion or petition was filed in said court at the time alleged praying for a writ of possession; that exceptions were filed to said proposed decree; that said exceptions are correctly set forth in the exhibit aforesaid, and that respondent sustained certain of said exceptions and refused to enter said proposed decree or award the writ of possession prayed for.

The proposed decree which respondent refused to enter is as follows, to wit:

"Now, on this day, came the plaintiffs, by U. M. and G. B. Rose, their solicitors, and, by leave of the court, having filed herein the mandate of the Supreme Court of the United States, wherefore it is now, on their motion, ordered, considered, and decreed by the court that all the right, title, claim, and interest of said defendant in and to lot 8, block 130, in the city of Hot Springs, be, and the same is, divested out of him, and that the same is vested in said plaintiffs, and that the account between said plaintiffs and defendant be stated in accordance with the directions contained in said mandate, and that in taking said account said defendant be charged with the rental value of said lot from the 23rd day of May, 1884, or during such portion of said time as *they* may have kept the plaintiffs out of possession thereof down to this date, with interest on the same from the end of each year at the rate of six per centum per annum; no additional rent, however, to be charged to said defendant by reason of any improvement placed thereon by said defendant, and that said plaintiffs be charged with all taxes paid by said defendants from the

23rd of May, 1884, with interest on the same from the time of such payment until this date, at the rate of six per centum; also with the present value of all improvements placed by defendants on said lot as the same may appear at this date; also the sum of $256.00 paid by said defendants to the United States for said lot, with interest on the same at the rate of six per centum per annum from January 1, 1882, until this date, and that said defendant pay all the costs by plaintiffs paid out and expended in this cause in this court, and that they have execution therefor as at law; and the special master herein is now directed to proceed to state an account between said parties according to the terms of this decree, and to that end he shall take testimony in writing of all witnesses produced, and shall report the same, with his proceedings and his findings herein, to this court at the next term thereof."

Among other exceptions to the proposed decree is the fifth, which is as follows:

"5. That one of the defences relied upon by the appellant in this cause at the hearing in which the former decree was rendered was that he was a purchaser for value from a person to whom the Hot Springs commission had awarded the lot in controversy without notice of the claim or contention of the appellees, and exhibited a quitclaim deed showing such conveyance and purchase in good faith and as evidence of his title; that this honorable court was of opinion, at the former hearing of this cause, that one holding under a quitclaim deed could not be regarded as a *bona fide* purchaser for value without notice, and that such a deed was not sufficient to put appellees to proof of notice; that one holding under a quitclaim deed could not avail himself of such a defense; that the Supreme Court of the United States, at the October term, 1891 (since the decision and ruling of this honorable court as aforesaid), has held in the case of McDonald *v.* Belding (145 U. S., 492) that the question of whether one was a *bona fide* purchaser for value without notice was one that was not to be determined by a mere inspection of the muniment of title, and that one could as well be a *bona fide* purchaser for value, without notice, under a quitclaim deed as one of warranty; that such a question was one to be settled by proof. Appellant states that there is no proof in the record showing that appellant had notice of the claim of appellees, and now denies, as is already denied by answer, that he had such notice, and submits that no decree ought to be rendered on the mandate herein in favor of the appellees, as to do so would not be according 'to right and justice and the laws of the United States' in the absence of proof that the appellees had such notice as is averred in the bill of complaint."

Case No. 379, McDonald *v.* Belding, 145 U. S., 492, and cases No. 227, Goode *v.* Gaines; No. 302, Smith *v.* Gaines; No. 303, Dugan *v.* Gaines; No. 304, Cohn *v.* Gaines; No. 305, Allen *v.* Gaines; No. 306, Madison *v.* Gaines; No. 307, Rugg *v.* Gaines; No. 308, Garnett *v.* Gaines; No. 309, Garnett *v.* Gaines; No. 310, Rugg *v.* Gaines; No. 311, Granger *v.* Gaines; No. 312, Neubert *v.* Gaines; No. 313, Sumpter *v.* Gaines; No. 314, Latta *v.* Gaines, and No. 315, Latta *v.* Gaines, were all cases growing out of what is known as the Hot

Springs reservation litigation. There were some questions common to all the cases. The question as to whether the action of the Hot Springs commissioners was final (Rector *v.* Gibbons, 111 U. S., 276) was common to all of them. The question as to the rights of those parties who had purchased and paid value without notice of any defect in the title, but who accepted quitclaim deeds from their grantors, was not common to all the cases, but was raised in several of the cases upon pleadings and proofs identical in substance and legal effect. Among the cases in which that question was raised upon substantially the same pleadings and proofs was case No. 379, McDonald *v.* Belding, and case No. 314, Latta *v.* Gaines, and case No. 307, Rugg *v.* Gaines. In the circuit court, most, if not all, of these cases were tried at the same time and treated very much as one case. On appeal in this honorable court it appears that the cases were all submitted and heard together with the exception of case No. 379, McDonald *v.* Belding, which was argued, submitted, and decided by itself. Why this case was separated from the others in the argument and submission in this honorable court respondent is not advised. It appears from the report (145 U. S., 141) that cases numbered 227, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, and 315 were argued April 18, 1892, and decided May 2, 1892, and that case No. 379, McDonald *v.* Belding, was submitted April 26, 1892, and decided May 16, 1892. In the case of McDonald *v.* Belding this honorable court said: "Under all the circumstances it cannot be held that McDonald, although taking a quitclaim deed, was chargeable, when he purchased, with notice of any existing claim to the property upon the part of the plaintiffs or of either of them," and reversed the decree of the circuit court and remanded the cause with directions to the circuit court to dismiss the bill. The same pleadings, the same proofs, and the same "circumstances" in substance and legal effect are present in the case of Latta *v.* Gaines and others and Rugg *v.* Gaines and others. On this point the pleadings and proofs in the last two cases may fairly be said to be identical with the pleadings and proofs in the case of McDonald *v.* Belding.

The contention of the petitioners is that while the mandate of this honorable court apparently reverses the decree of the circuit court that this honorable court did not intend so to do, but only intended to reverse so much of said decree as related to the mode of stating the account of rents and profits between the parties. Such an intention could have been made perfectly clear by affirming so much of the decree as vested title in the petitioners and directing how the account should be stated. Instead of doing that it reversed both the interlocutory and final decrees and remanded the cause to be proceeded in — accord*ing* to law and justice and the laws of the United States, in conformity to the opinion of this honorable court.

If the Supreme Court has not in fact reversed that portion of the decree of the circuit court which vested title in the petitioners, then there is no necessity for entering any portion of the proposed decree save that which directs the manner of stating the account. If it

has reversed that portion of the decree vesting title in the petitioners and remanded the cause to be proceeded in in accordance with the opinion of this honorable court, the determination of what the opinion directs calls for the exercise of judicial functions and discretion, and it is submitted that such discretion cannot be controlled by mandamus.

In the McDonald-Belding case it appears that one Flynn leased a lot in the Hot Springs reservation from Belding and made some improvements thereon; that after the appointment of the Hot Springs commission, Flynn, on the ground that he had made the improvements on the lot, made claim to it, and Belding claimed that he was entitled to it by reason of previous occupation and possession, and that he held continuous possession through Flynn, his tenant. The commission awarded the lot to Flynn, who afterwards and before the commencement of suit by Belding sold and conveyed the same to McDonald by a quitclaim deed. After the sale to McDonald, Belding commenced suit against both of them, seeking to charge them as trustees and to compel them to convey to him, alleging that McDonald purchased with full knowledge of his (Belding's) equities. McDonald denied notice of the alleged equities of Belding and claimed to be an innocent purchaser for value. The circuit court held that one holding under a quitclaim deed could not be regarded as an innocent purchaser for value, and rendered a decree in favor of Belding. This honorable court, on appeal, held that McDonald, under the quitclaim deed, could be and was an innocent purchaser for value, and reversed the decree of the circuit court and directed that the bill should be dismissed.

In view of the uniform character of the Hot Springs litigation and the customary mode and manner of hearing and deciding what are known as the Hot Springs cases, respondent believes that the circuit court, in the disposition of said cases reversed by this honorable court and remanded to the circuit court with instructions to proceed therein "according to right and justice and the laws of the United States," should give effect to the several decisions of this honorable court in the Hot Springs cases, and that where the pleadings and proofs are identical with the pleadings and proofs in McDonald *v.* Belding that the circuit court should apply the doctrine of that case, and that the opinion in that case should be read into and treated as if it were a part of the opinion in the consolidated case reported under the title of Goode *v.* Gaines, in such of the cases embraced therein as are on all fours with the case of McDonald *v.* Belding.

Respondent respectfuliy submits to the judgment of this honorable court and will enter and enforce by proper decree any order or decree made by this honorable court in and about the matters complained of; and respondent respectfully refers to the brief of the counsel for George G. Latta and D. C. Rugg, which will be filed in this cause, and the authorities therein referred to, to show why a peremptory writ should not issue.

HENRY C. CALDWELL,
United States Circuit Judge, Eighth Circuit.

Office Supreme Court U. S.
FILED.
MAR 7 1893
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

WILLIAM H. GAINES ET AL.
v.
H. C. CALDWELL. *Judge, etc.*,
D. C. RUGG AND GEO. G. LATTA.

MANDAMUS.

BRIEF FOR D. C. RUGG AND GEO. G. LATTA.

JOHN MCCLURE, & A. H. Garland
For Rugg and Latta.

ARKANSAS DEMOCRAT CO., LITTLE ROCK.

IN THE

Supreme Court of the United States.

WILLIAM H. GAINES ET AL.
v.
H. C. CALDWELL. *Judge, etc.*,
D. C. RUGG AND GEO. G. LATTA.

MANDAMUS.

BRIEF FOR D. C. RUGG AND GEO. G. LATTA.

The hallucinations which, from time to time, afflict mankind are indeed wonderful. The brief of the petioners is an exemplification of the fact.

The sole question in this case is, whether a peremptory writ of mandamus ought to issue.

Yet we are furnished with a discussion of the *statute of uses*—another upon what matters are before the Court on a *second appeal*—another upon and under what circumstances a *bill of review* might be filed and sustained, and another to show that second appeals ought not to be tolerated. The array of authorities in support of these propositions evidences great industry and a wonderful variety of legal acumen. The display of learning is to be admired, but its lack of application to the questions before the Court detracts from what otherwise might be regarded as a commendable effort.

An attempt to obtain a construction of the former decree under the guise of a mandamus proceeding.

That this is an attempt, under the guise of a mandamus proceeding, to induce this Court to construe its former decree, and tell the Court below, in advance, what the opinion means, or was intended to mean, cannot be doubted.

The construction of a statute calls for the exercise of judicial knowledge and discretion. The construction of a decree or mandate calls for the exercise of the same functions, and the meaning of the words in an opinion, which may be referred to in guiding the Court below, falls within the same rule.

The Court below say (*printed record, p. 26*) : "But as the plaintiffs announce their purpose to apply to the Supreme Court of the United States for a writ of mandamus to compel the entry of said decree, as prepared by the plaintiff's solicitors, and the Court being willing to expedite the said proposed proceeding, it is further ordered that said proposed decree and petition of the plaintiffs for the entry thereof, be made a part of the record herein."

The effect of this order is, that the Judge below, on being threatened with a mandamus, has, in effect, said to petitioners : "You now have my construction of the mandate and the opinion, and if you do not like it, I will *expedite* the said proposed mandamus, and thus, before

further steps are taken herein, obtain the opinion of the Supreme Court, to guide my further action."

I can see no difference, in principle, between the present application and that which was made in *Sturgis v. Joy* (*Eng. Com. Law., 739*). The question in that case, arose over the true construction of an act of Parliament, where the Commissioner refused to enter satisfaction of a judgment, and stated that, as the judges of the Insolvent Court differed in opinion as to the true construction of the act, he would suspend making any order until the executor had opportunity *of applying for a mandamus*, as it *was suggested*, the opinion of the Court of Queen's Bench, on the construction of the act, that might thus be obtained, *for the guidance of the Commissioner.*

The analogy consists in this, that it is an attempt to obtain from the Court some expression of opinion as to *what* the language found in the opinion means, *and what construction should be placed upon it.* Lord Campbell, in disposing of the question, said :

"If this were a matter in which mandamus would lie, you have said enough to show that it would be a proper case for a rule *nisi*; but it is within the jurisdiction of the Insolvent Debtors Court to say whether the debts are satisfied within the meaning of the act. Whether they have decided rightly or wrongly, we cannot grant a mandamus commanding a Court of competent jurisdiction to put *a particular construction on this act of Parliament.*"

This Court reversed these decrees, and remanded the

causes to a Court of competent jurisdiction, with instruction that such further proceedings be had in said cause, "in conformity with the opinion and decree of this Court, as according to right and justice, and the laws of the United States ought to be had."

The opinion constitutes *the law of the case*, as fully as though the rights of the parties depended upon and had been declared *by an act of Congress*. No portion of the decree of the Court below is affirmed, nor is it in any manner modified. It is a decree *of absolute reversal*, without direction to the Court below to render a decree in favor of the *plaintiff* or *defendant*, but according to law and justice, as the Court below may find the law and justice to be. It is true, there is a command to reverse the former decree, but from that point on, how the Court is to proceed, is to be gathered from the opinion of this Court.

The act of construing *the intent and meaning of the opinion*, is one that calls for the exercise of judicial knowledge and discretion, as much so *as the construction of a statute*. The petitioner seems to think the Court below, in the exercise of its discretion, must accept that construction placed upon the meaning of the opinion, which is found *in the proposed decree*. He asks this Court, by mandamus, not to compel the Court *to proceed to decree*, but to make its judgment and discretion *conform to his;* or if not that, to induce this Court, in this form of proceeding, to declare, *in advance* of the entry of any decree, that this Court is of the opinion that *counsel*

for the petitioner understands what this Court intended to do, *better than the Court below does*..

Under this state of facts, the sole office which the writ of mandamus could perform, would be to compel the Court below to *forbear the exercise of its judicial opinion and discretion*, and accept that of the counsel who presents this petition. It may be urged that if this Court agrees with the counsel for the petitioner, that the writ would only compel the Court below to proceed in accordance *with the judgment of this Court.* The judgment of this Court, in this case, *has been rendered*, and it is without power to *render another*, until the case is again brought before it on appeal. The power of this Court to issue writs of mandamus is limited to cases "warranted by the principles and usages of law, to Courts appointed under the authority of the United States."

Ex parte Newman, 14 Wall., 165.

Ins. Co. v. Wilson, 8 Peters, 302.

Ex parte Many, 14 How., 24.

In *ex parte Clark, 13 Peters, 404*, the application for mandamus was to compel the Court below to proceed according to chancery practice, in such manner as was authorized by the Constitution of the United States and the principles and usages of equity, and Justice Story, in speaking for this Court, said:

"That it is the *duty* of the Circuit Court to proceed, in this suit, according to the rules prescribed by the Supreme Court for proceedings in equity causes, *can admit of no doubt.* That the proceeding of the District Judge,

and the orders made by him in the cause, which are complained of, *are not in conformity with those rules, and with chancery practice, can admit of as little doubt.* But the question before us is not, as to the regularity of those proceedings, but whether the case before us is one in which mandamus ought to issue. *And we are of opinion that it is not such a case.* The District Judge is proceeding in the cause, however irregular that proceeding may be deemed; and the appropriate redress, if any, is to be obtained *by appeal,* after final decree shall be had in the cause. A writ of mandamus is not the appropriate remedy for any orders which may be made in a cause by a judge, in the exercise of his authority; although they may seem to bear harshly, or oppressively upon the party."

Is the *opinion* of this Court, of more binding force and effect, than the *rules prescribed by it for the conduct of equity cases.* They are as much directions how the Court below shall proceed, in equity cases, as the opinion of the Court declaring the mode of procedure in an equity case, which has been remanded without direction, whether the decree shall be for the plaintiff or defendant. If the observance of the one cannot be enforced by mandamus, how can the other?

That the decrees of this Court cannot be questioned, and that mandamus will lie to compel their enforcement, no one denies. But before a mandamus can issue to enforce a decree there must be a *decree* to *enforce.* That is what is the matter with this case—there is *no decree* to

enforce. If the Court misconstrues the opinion of this Court and renders a decree not in conformity to it, that is *error* for which an appeal will lie, but it furnishes no ground for the control of the discretion of the Court below, by a writ of mandamus.

This Court is asked to do just what it refused to do in *Insurance Co. v. Adams, 9 Peters, 602*—that is, to decide that the *merits of the cause are with the petitioner.* It appears there had been a judgment on notes, which were due, at the time of its rendition, and a consent in the same judgment that the Court should render judgment on the unmatured notes as they became due. The Court refused to enter judgment on the maturing notes, and this Court was asked, by writ of mandamus, to compel it to do so, and this Court said:

"This Court is requested to issue a mandamus, to enter a judgment in a cause supposed to be pending in the Court of Louisiana; *not according to the opinion it may have formed on the matter in controversy,* but according to the opinion which *may be formed by this Court.* This Court is asked to decide that the *merits* of the cause *are with the plaintiff,* and to command the District Court to render judgment *in his favor.* * * * Though the merits of the cause may have been substantially decided, while anything, though merely formal, remains to be done, this Court cannot pass upon the subject."

It is hardly necessary to say the mandamus was denied. What was asked in that case is asked in this, that the Court below shall be directed to enter a decree, *not*

according to the opinion it may have formed, but according to the opinion *which may be formed by this Court.* This Court has tried this case *once*, and it cannot *re-try it in this form of proceeding.*

In the same case (*9 Peters, 602*), this Court said: "To order the District Court to give judgment for the plaintiff, is to direct in what manner its discretion shall be exercised."

The Refusal of the Circuit Court to enter the proposed decree grows out of the exercise of judicial judgment and discretion.

The respondent in explanation of why he did not enter the proposed decree, says:

"There were some questions common to all the cases. The question as to whether the action of the Hot Springs Commission was final was common to all of them. The question as to the rights of those parties who had purchased and paid value, without notice of any defect in the title, but who had accepted quitclaim deeds from their grantors, was not common to all the cases, but was raised in several of the cases upon pleadings and proofs, identical in substance and legal effect. Among the cases in which that question was raised, upon substantially the same pleadings and proofs, was case *No. 379, McDonald v. Belding*, and case *No. 314, Latta v. Gaines*, and case *No. 307, Rugg v. Gaines.* * * *

"In the case of *McDonald v. Belding*, this Honorable

Court said: 'Under all the circumstances, it cannot be held that McDonald, although taking a quitclaim deed, was chargeable, when he purchased, with notice of any existing claim to the property, upon the part of plaintiffs, or either of them,' and remanded the cause with directions to the Circuit Court to dismiss the bill. The same pleadings, the same proofs, and the same *circumstances* in substance and legal effect, are present in the case of *Latta v. Gaines*, and *Rugg v. Gaines*. On this point, the pleadings and the proofs, in the last two cases, may fairly be said to be identical with the proofs in the case of *McDonald v. Belding*. * * *

"In view of the uniform character of the Hot Springs litigation and the customary mode and manner of hearing and deciding what are known as the Hot Springs cases, respondent believes that the Circuit Court, in the disposition of said cases, reversed by this Honorable Court, and remanded to the Circuit Court with instructions to proceed therein according to right and justice and the laws of the United States, should give effect to the several decisions of this Honorable Court, in the Hot Springs cases, and that where the pleadings and proofs are identical with the pleadings and proofs in *McDonald v. Belding*, that the Circuit Court should apply the doctrine of that case, and that the opinion in that case should be read into, and treated as if it were a part of the opinion in the consolidated case of *Goode v. Gaines*, in such of the cases, embraced therein, as are on all fours with the case of *McDonald v. Belding*.

In the McDonald-Belding case, it appears that Flynn leased a lot on the Hot Springs Reservation, from Belding, and made some improvements thereon. That after the appointment of the Hot Springs Commission, each of them preferred a claim to purchase the lot, and that the Commission gave the preference right to purchase to Flynn. After the award, and before the commencement of suit by Belding, Flynn sold and conveyed the lot to McDonald, by a quitclaim deed. Belding, after the sale, filed a bill against Flynn and McDonald, charging McDonald with notice of his equities, at the time of purchase, to charge them as trustees, and compel them to convey. McDonald denied notice of the alleged equities of Belding, and claimed to be an innocent purchaser, for value, without notice. The Circuit Court held that one holding under quitclaim deed could not be regarded as an innocent purchaser, for value, and rendered a decree in favor of Belding. This Court, on appeal, held that McDonald, under quitclaim deed, could be, and was an innocent purchaser for value, and reversed the decree of the Circuit Court and directed the bill to be dismissed.

In the Goode case, the record shows, and the opinion deals with a controversy between Gaines, as the landlord, and Goode, his former *tenant*, who had obtained the legal title to the lots in controversy, as against his landlord, under an adjudication had between them, before the Hot Springs Commission. The language of the opinion is:

"The argument for the appellants has been elaborate and exhaustive, but does not convince us that those cases

can be taken out of the rule and laid down in Rector v. Gibbon. The estoppel, which prevents a *tenant*, who has acquired possession as such, from claiming adversely to his landlord, does not depend on the validity of his landlord's title."

This language can have no application to a case, like the one now under consideration, where the relation of landlord and tenant never existed, and where the party went into possession under a purchase from a person to whom the Hot Springs Commission had awarded the right to purchase, and who paid full value therefor without notice of the petitioners' claim.

In the Rector-Gibbon case, the controversy was between Rector and the persons to whom the Hot Springs Commission had awarded the right to purchase the lots in dispute. Both had filed claims before the Commission, and the award was made to one who went into possession under the assignment of a lease, in which Rector had been recognized as landlord, and the object of the bill was to charge them as trustees, and compel them to convey the legal title which they had obtained under what was called an error of law, committed by the Commission, and suit was commenced before the person to whom the award was erroneously made, had parted with the title thus obtained.

So, in the case of Goode vs. Gaines, the contention was between the landlord and former *tenant*, who held the legal title. The only difference in the cases is, that in the Rector-Gibbon case, the lease provided that, at the ex-

piration of its term, the improvements should belong to Rector, while in the other, the lease provided that the tenant should have the privilege of removing his improvements.

In nine of the cases argued and submitted at the time the Goode case was, the pleadings and proof show, that the defendants relied upon precisely the same defense that was relied upon in the McDonald-Belding case, and the cases now at bar are of that number.

The defendants, Latta and Rugg, were never at any time a *tenant* of Gaines, nor did they acquire possession under or by virtue of a lease. Their possession was acquired just as was McDonald's, from one to whom the Commission had made an award, and without notice of the pretended claim of Gaines.

Under the same state of facts the law ought to be the same, and if it is not, it must be for some reason not expressed in the Goode case.

It will no doubt be urged that if these questions were in the case, the Court will be presumed to have passed upon them and that the defendants are now concluded. If the decrees had been affirmed, the position would be tenable; but inasmuch as they were reversed and remanded without anything in the decree, mandate, or opinion, from which such an inference could be drawn, this seems to me, is to charge this Court with having given one man his property upon a given state of facts, and to have taken away the property of nine others, who stood upon precisely the same footing. The charge is unworthy of belief.

Is the decree one of absolute reversal, and if not, is anything left to the Circuit Court in the way of discretion or construction?

The language of the mandate is as follows:

"It is now here ordered, adjudged, and decreed by this Court, that the decree of the said Circuit Court, in this cause, be and the same is hereby reversed, each party to pay one-half of the costs in this Court.

"And it is further ordered that this cause be, and the same is hereby remanded to the said Circuit Court for further proceedings to be had therein, in conformity with the opinion of this Court.

"You therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion and decree of this Court, as according to *right* and *justice*, and the laws of the United States, ought to be had, the said appeal notwithstanding."

As will be seen, the decree is one of absolute reversal. The cause is remanded for decree in conformity with the opinion, and according "to right and justice."

In *Davis v. Packard, 8 Peters, 323*, the mandate declared:

"Whereupon it is ordered and adjudged by this Court, that the judgment of the said Court of Errors (of the State of New York) be, and the same is hereby reversed, and that this cause be, and the same is hereby remanded to the said Court of Errors, with directions to conform its judgment *to the opinion of this Court.*"

In speaking of the effect of this language, and what the Court below should do under such a mandate, Chief Justice Marshall said :

"The original judgment of the Court of Errors which was brought before this Court, was reversed *in terms.* This reversal was not to depend upon any act to be performed, or opinion to be given by the Court of Errors, but stood absolute by the judgment of this Court, * * * On filing the mandate there, the said judgment stood reversed."

"Neither the judgment or mandate of this Court, in terms, prescribed the judgment which should be rendered by the Court of Errors. This Court proceeded to order that, the cause be remanded to the said Court, with directions to conform its judgment to the opinion of this Court. The judgment rendered in the Court of Errors, being thus reversed because of this exemption, it was for the Court of Errors *to inquire and decide in what manner it should conform its judgment to this opinion.*"

If the Court of Errors was clothed with the power to inquire and decide in what manner it should conform its judgment to the opinion in the case cited, it follows, without the saying, that a like discretion belongs to the Circuit Courts.

The contention of the petitioners is, that the filing of the mandate in the Circuit Court, operated as an affirmance of its former decree instead of a reversal, and that it is the duty of the Circuit Court to disregard the plain command of the mandate, and enter a decree at

variance with it. The remarkable thing about this, that it is insisted the Court has no discretion about it—that it has only a ministerial duty to perform.

The delusion thus indulged finds a parallel in *Laithe v. McDonald, 7 Kansas, 266.* The closing sentence of the opinion which was filed in that case was as follows:

"The judgment of the court below must be reversed and the cause remanded for further proceedings."

This direction was incorporated into the judgment entered and the mandate sent to the court below. When the mandate was filed in the court below, counsel for Laithe, who had obtained the judgment in the court below, moved the Court to set aside the judgment and enter another in his favor. This the Court refused to do, but set aside the former judgment. From the refusal to enter judgment in favor of Laithe, an appeal was taken, and Judge Brewer, speaking for the court, said:

"We see no reason to doubt that the term (reverse) as used in opinions, judgments and mandates, means what we have always understood it to mean—setting aside, annulling, vacating—at least such is the sense in which it was used in this case."

The argument in the brief of petitioners is, from the standpoint, that the words "reversed" and "affirmed" are synonyms when used in equity cases.

This Court is asked to award a peremptory writ of mandamus "commanding Henry C. Caldwell, as Judge of said Circuit Court, to grant the petition *for a decree filed by your petitioners* in said cause."

The specific decree thus prayed for, and which this Court is to command the entry of, is as follows:

"Whereof, it is now ordered, considered and decreed by the Court, that all the right, title, claim and interest of said defendant in and to lot —— in block —— in the City of Hot Springs, be and the same is divested out of him and that the same be vested in said plaintiffs, and that the account between said plaintiffs and said defendant be stated in accordance with the directions contained in said mandate, etc."

As is well remarked by the Circuit Judge:

"If the Supreme Court has not, in fact, reversed that portion of the Circuit Court which vested title in the petitioners, then there is no necessity for entering any portion of said decree, save that which directs the manner of stating the account. If it has reversed that portion of the decree vesting title in the petitioners, and remanded the cause to be proceeded in, in accordance with the opinion of this Honorable Court, the determination of *what*, the opinion directs, calls for the exercise of judicial functions and discretion, and it is submitted that such discretion cannot be controlled by mandamus."

When applications for mandamus are warranted.

The question of when applications for mandamus are warranted was discussed in *ex parte Newman, 14 How., 165*, where this Court said:

"Applications for a mandamus, to a subordinate court, are warranted, by the principles and usages of

law, in cases where the subordinate court, having jurisdiction of a case, refuses to hear and decide the controversy, or where such a court, having heard the cause, refuses to render judgment or to enter a decree in the case, but the 'principles and usuages of law,' do not warrant the use of the writ to *re-examine* a judgment or *decree* of a subordinate court *in any case;* nor will the writ be issued to direct *what* judgment or *decree* such a court shall enter *in any pending case*, nor will the writ be issued in any case, if the party aggrieved may have a remedy *by writ of error or appeal*, as the only office of the writ, when issued to a subordinate court, is to direct the performance of a ministerial act or to command the Court to act in a case where the Court has jurisdiction *and refuses to act*, but the supervisory court *will never prescribe what the decision of the subordinate court shall be*, nor will the supervisory court interfere, in any way, *to control the judgment or discretion of the subordinate court* in disposing of the controversy. Power is given to this Court, by the judiciary act under a writ of error or appeal, to affirm or reverse the judgment or decree of the Circuit Court, and, in certain cases, to render such judgment or decree as the Circuit Court should have rendered or passed, but no such power is given *under a writ of mandamus*, nor is it competent *for the superior tribunal*, under such a writ, to *re-examine the judgment or decree of the subordinate court.* Such a writ cannot perform *the functions of an appeal* or writ of error, as the superior court will not, in any case, direct the judge of the subordinate court *what* judgment

or decree to enter in the case, as the writ does not vest in the superior court any power *to give any such direction*, or to interfere, in any manner, with the judicial discretion and judgment of the subordinate court."

In *ex parte Railway Co. 101 U. S., 720*, a writ of mandamus was asked to compel the subordinate court to make speedy compliance with the mandate of this Court and this Court said:

"We recognize, in its fullest extent, the power of this Court, by mandamus, to enforce prompt compliance with its mandates; but it is not consistent with the principles and usages of law, in that summary manner, to *revise* the action of inferior courts, as to matters about which they *must or may exercise judicial discretion*. The writ has never been extended so far, *nor ever used to control the discretion and judgment of an inferior court of record, acting within the scope of its judicial authority.*"

Ex parte Flippin, 94 U. S., 348. XX

In *ex parte Burtis, 103 U. S., 238*, this Court said: "A writ of mandamus may be used to compel an inferior court to *act* on a matter within its jurisdiction, *but not to control its discretion while acting, nor reverse its decisions when made.* The District Judge took jurisdiction of the matter, as it was his duty to do, heard the parties, and decided adversely to the claim of the petitioner. In this he may have done wrong, and the *reasons* he has assigned may not be such as will bear the test of judicial criticism; but we cannot, by mandamus, compel him to undo what

XX Ex parte Loring. 94 U.S. 418.

he has thus done, in the exercise of his legitimate jurisdiction."

These authorities, and the rulings of this Court from its organization down to the present time, show that, if the court below has any discretion left it, under the mandates, this Court will not interfere, by mandamus, with the exercise of that discretion, but will compel the parties complaining of it to correct the error on appeal or writ of error.

The decree proffered is an entity. If any of the exceptions are good, the writ must be denied, for the prayer is that the Judge shall be commanded "to grant the petition for a decree filed by your petitioners in said cause."

As to that phase of the prayer which asks the Court to make "such other orders and decrees as may be deemed proper to carry out the decree heretofore rendered," etc. I have only to say what was said in *ex parte Newman, 14 How., 165:*

"Power is given to this Court by the judiciary act, under a writ of error or appeal, to affirm or reverse the judgment or decree of the Circuit Court, and, in certain cases, to render such judgment or decree as the Circuit Court should have rendered or passed, *but no such power is given under a writ of mandamus;* nor is it competent for the superior tribunal, under such a writ, *to re-examine the judgment or decree of the subordinate court;* such a writ *cannot perform the functions of an appeal,* or writ of error, as the superior court will not, in any case, direct the Judge of the subordinate court *what* judgment or decree nothing left but to execute it. The case furnishes neither

to enter in the case, as the writ *does not vest*, in the superior court, *any power to give such direction*, or to interfere, in any manner, *with the judicial discretion of the subordinate court.*"

Are you not asked to *re-examine* the decree of the Circuit Court? and make a mandamus perform *the functions of an appeal?* Are you not asked to direct the Circuit Court *what* decree to enter, and set aside that which it has already entered? Can you do this without interfering with, and controlling its discretion?

To award a mandamus to enter the proposed decree, takes from the court below the power to appoint a master of its own selection to state the account, and substitutes the master who stated the account before. It takes from the court the power to institute an inquiry to ascertain what sum the defendant paid the United States for the lot in controversy and when it was paid and in lieu thereof compels the court to accept a date fixed by the petitioner. It takes from the court all discretion as to proportioning the costs of suits between the parties, and in lieu thereof directs the defendant to pay all the costs of suit in the Circuit Court. It denies to the court the right to render a decree against the petitioners for one-half the costs of the transcript under section three, of rule twenty-four, of this Court. In short, deprives the court ef all discretion, and substitutes in lieu thereof that of the petitioner.

See High on Mandamus. ss 156 notes 1+2 (2? Ed.)
Merrill Mand. Sec. 201 note 2
213 & 313 note 3.

The cases cited in petitioners' brief, furnish neither guide nor precedent in the case at bar.

In the cases referred to in the petitioners' brief, in so far as they relate to the duty of the Circuit Court, in acting under the mandate, or in obedience thereto, an examination discloses that they were all cases, save one, where the judgment or decree of the court below was *affirmed*, or where this Court had reversed the cause and entered the judgment or decree in this court, which ought to have been entered below, or where the judgment or decree of that court had been reversed and remanded, with direction to enter a judgment or decree in favor of one of the parties.

In *Chaires v. United States, 3 How., 619*, the court below entered a decree as to certain lands specifically described by metes and bounds. This Court, on appeal, affirmed that decree, and remanded the cause. After the cause was remanded, an effort was made to have the court modify the decree thus affirmed, so as to make it apply to other and different lands. In speaking of that character of proceeding, this Court said:

"The court below can only execute the mandate of this Court. It has no authority to disturb the decree, and can only settle what remains to be done."

I do not question the law of that case. A decree had been rendered which this Court affirmed. There was nothing left but to execute it. The case furnishes neither

precedent nor rule to guide a court where a decree has been reversed and remanded, with direction to the Court to proceed in accordance with law and justice.

In *Skilleren v. May, 4 Cranch., 140*, this Court entered the following decree:

"It is therefore decreed and ordered, that the decree of the District Court, rendered in the original cause, be reversed and annulled with costs, and this Court doth remand the same to the said District Court for further proceedings to be had therein, in order that an equal and just partition of the 2,500 acres of land mentioned in the assignment, be made between the legal representatives of Skilleren and May. And so much of the decree in the cross-bill, as enjoins $4,416.66, part of the judgment at law, this Court doth affirm the same, and as to the residue of said decree, it is decreed and ordered that the same be reversed and annulled, with costs; and this Court proceeding to give such decree in the said cross-suit, as the District Court ought to have given, it is further decreed and ordered, that the judgment at common law, mentioned in the said bill, be perpetually enjoined."

When the mandate was filed and decree asked, one of the judges was of the opinion that the court below did not, originally, have jurisdiction of the cause. There being two judges, the cause was certified to this Court on that point, and in answer this Court said:

"It is the opinion of this Court that the Circuit Court is bound to carry that decree into execution,

although the jurisdiction of that court *be not alleged in the pleadings.*"

That is all that was presented or decided in that case, yet it is relied upon as an authority to show that mandamus is the proper remedy in the cases at bar.

In *Washington Bridge Co. v. Stewart, 3 How., 419*, a decree was entered by the court below, and, on appeal, this court affirmed it, and remanded the cause with instructions to carry the decree into execution. An account had been stated, to which neither side filed exceptions, which was afterwards affirmed by a proper decree. From that decree an appeal was taken to this court, and it properly refused to re-examine the matters which had been settled by the former decree.

In *ex parte Dubuque R. R., 1 Wall.*, it appears that one Litchfield brought suit for a tract of land, against the railroad company. Judgment was for Litchfield, and the railroad company brought the case here on a writ of error. This Court reversed the judgment in favor of Litchfield, and ordered the court below to enter judgment for the railroad company. Upon filing the mandate the court below entered judgment in exact accord with the mandate. After that was done, upon motion, a new trial granted to Litchfield, under a statute which provides for a second trial in actions of ejectment. This court was then applied to for a writ of mandamus, commanding the court below to vacate the order granting the new trial. Under the judiciary act of 1789, when this court found for the defendant below, it was bound to enter judgment

in this court, in his favor, for this reason, the Court said:

"The District Court had no power to set aside the judgment of the Supreme Court—its authority extending only to executing the mandate."

In that case, the court below was directed *in whose favor* to enter judgment.

In *Maguire v. Tyler, 8 Wall., 650,* a judgment was rendered in one of the courts of the State in favor of the plaintiff below. That judgment was reversed by the Supreme Court of Missouri, and it was brought here on a writ of error. This court reversed the judgment of the Supreme Court of Missouri, and remanded the cause with directions to affirm the decree of the inferior State Court. On filing the mandate from this Court the Supreme Court of Missouri reversed its former decree and dismissed the bill instead of affirming the judgment of the court below. The cause again came before this court (*17 Wall., 292,*) and the judgment of the Supreme Court of Missouri was reversed, and this Court entered such a decree as ought to have been entered and directed the Marshal of this Court to put the complainant into possession.

In *Stewart v. Salamon, 97 U. S., 361,* a decree was entered by the court below, in accordance with the mandate of this Court. From that decree an appeal was prosecuted to this Court and in disposing of it this Court said:

"Such a decree (that is, one in exact accordance with the mandate), when entered, is in effect our decree, and the appeal would be from ourselves to ourselves."

In *Darrant v. Essex Co., 101 U. S., 555*, the bill was dismissed by the court below, and, on appeal, that dismissal was affirmed by this Court. Upon filing the mandate the appellant asked leave to discontinue the suit, and if not that, to be allowed to dismiss without prejudice. These requests were refused and the court below entered judgment in acccordance with the mandate. Afterwards the appellant instituted another suit to obtain the same relief, setting up what he alleged was new matter. To this, the former decree was pleaded in bar. The plea was sustained and the cause again came here on appeal, and the Court in affirming the lower court said:

"We might have ordered a modification so as to declare that the dismissal should be without prejudice. We did not do so. The Circuit Court had no power after that to do what we might have done and did not do."

As has been said, in all of these cases, there was a judgment or decree which had been *affirmed*, or a decree of this Court directing judgment or decree in favor of either the plaintiff or defendant. What application these cases can have to a case where the decree of the court below has been *reversed* and remanded without further direction than, "to proceed according to law and justice and the laws of the United States," is beyond my understanding.

This Court has settled what discretion the Circuit Courts have, in construing mandates like the one now under consideration.

The authority and power of the court below, where a cause has been remanded to proceed, "according to law and justice," and that mandamus will not lie to control the discretion of the court while it is thus proceeding, has been settled too often to talk about.

In *Ex parte, Medway, 23 Wall., 504,* the court below found that the plaintiff was the owner of ninety-four bales of cotton; that they had been captured by the military forces of the United States; that they had been turned over to the treasury agent; that they had been sold by him, and that the net proceeds were in the treasury of the United States; but the court refused to find the amount of the net proceeds, then in the treasury. Judgment was rendered against the plaintiff who prosecuted an appeal to this Court.

On the state of facts thus found, this court held, the court below should have found the net proceeds in the treasury, and in favor of the plaintiff, and remanded the cause, "for further proceedings 'in conformity with law and justice.'" The mandate was filed in the court below, and the court was asked to proceed with the case, *from the point reached by the court below, at the time the appeal was granted,* which, he alleged, would be "in conformity to law and justice." The court refused to proceed, from that point, and ordered that all the finding of facts

originally made and filed, and upon which the case had been tried in this court, should be set aside and held for naught, and that a trial *de novo* be had.

The plaintiff, thereupon, filed a petition in this court, setting forth the above recited facts, praying that the judges of the court show cause, if any they could, why a mandamus should not issue to said court, to compel it to vacate its order, setting aside its former findings and ordering a trial *de novo* and that it proceed, in obedience to the mandate, of this court, and, "in conformity to law and justice in the case."

The rule to show cause was served, and, in reply the Court answered:

1. "That the mandate of the the Supreme Court left the court free to decide what further proceedings in the case would be, '*in conformity to law and justice.*"

2. "That it was, 'in conformity to law and justice' to set aside the finding of fact, which had been made on the first trial, and try the case *de novo.*"

The mandamus was denied, and in disposing of the case this Court said:

"Our mandate required the court to proceed, in the cause remanded '*in conformity to law and justice.*' We did not undertake to direct, *what* law and justice did require, any further than to say, upon the finding of fact, appearing in the record sent us on appeal, the judgment was erroneous. *In everything else, the Court was left free to proceed with the cause, in its own way, and according to its*

judicial discretion. That discretion we cannot control, *in this form of proceeding.*"

So in the case at bar, the mandate does not attempt to declare, nor does the opinion, which may be treated as a part of it, what law and justice did require, but left the court below, free to proceed with the cause, in its own way, according to its own discretion. If mandamus would not lie in that case, it will not lie in this, unless the Court departs from its former ruling.

In *ex parte French, 91 U. S., 424,* it appears that French brought suit against Edwards and others to recover possession of certain lands. The defenses were:

1. Want of title in the plaintiff.
2. Statute of limitation, and
3. Title in themselves.

The court below found that, the defendants were in possession of the property adversely; that the plaintiff once held title, but had parted with it, and entered judgment for the defendants. There was no specific finding, as to the statute of limitation, nor as to the defense of title in themselves, as the first finding was sufficient to dispose of the case in the view which the court below took of it.

The case was brought to this court, and it found that the court below erred in not presuming a reconveyance to French, and reversed the cause and remanded it to the court below with directions to proceed "*in conformity to law and justice.*" Upon filing the mandate in the court below, French contended, as the petitioner in

this case contends, that the Court should render a judgment in his favor and against the defendants for the property in dispute. That is a much stronger case than the one at bar, because, this Court found that title was in French, notwithstanding in his first conveyance, but it expressed no opinion as to whether it had been divested by reason of the statute of limitation, or by conveyance or operation of law, to the defendants.

Instead of rendering a decree in favor of French, the Court obeyed the mandate, by reversing the former judgment, and then ordered the cause to be set down for a new trial. Application was then made to this Court for a mandamus to compel the court below to enter judgment on the mandate, in accordance with the construction placed on it *by the petitioner*, and in response thereto this Court said:

"We determined that the facts found were not sufficient to justify the conclusion reached, and have ordered the Court to proceed with the cause, notwithstanding the finding. Our action only precludes that Court from adjudging in favor of the defendants upon the special facts sent here for our opinion. *In all other respects, the Court is at liberty to proceed in such manner as 'according to its judgment, justice may require.'*"

In the cases at bar, this Court has gone no further than in the French case. Whether the petitioners ever acquired the interest of the Belding heirs, or only a portion of them; or whether any of them are innocent purchasers for value, under the rule laid down in the

McDonald-Belding case; or whether Gaines, by reason of judgment against him, for the property in dispute, to which he consented, shall have their full force and effect; or whether by express stipulation, in writing, that the present defendants should have the property awarded them if they would pay him the back rents, free from all claim on his part, are questions not passed upon by this Court.

In *Martin v. Hunter, 1 Wheat., 355*, it is said:

"A final judgment of the Court is supposed to be conclusive upon the rights which it decides."

No one questions this doctrine, in a case where there is a *final* judgment, or decree, but there is no final judgment or decree in this case. There was a decree, but it has been *reversed*.

In speaking of the mandate and decree (page 9 of petitioner's brief), counsel say:

"To say, then, that the decree here virtually reverses the *whole* decree below, is to say that this (the Supreme Court) has done that which, according to its own account, it had no reason for doing, and has done something which it has said ought not to be done; or else it is to assert that this (the Supreme Court) is incapable of reversing a part of a decree and leaving the rest of the decree unimpaired; which is notoriously not true."

If the Congress repeals an act, in absolute terms, and makes no reservations of any kind, the whole act becomes as though it had never been passed. If a Court reverses a judgment or decree, which vested title in one,

and divested it out of the other, without placing any reservations or making any exceptions in favor of either party, the decree becomes as though it never had been entered.

I shall assume that this Court possesses inteligence enough to draft a decree expressive of its findings, and that it has done so. I shall not assume that it intended to do one thing and through inadvertence, or ignorance did another. That which the Court did is a matter of record, and I shall not intimate that record does not speak the truth, or fails to express what the Court intended to do.

Appeal, and not mandamus, is the proper remedy, for the matters complained of, if erroneous.

This proceeding, as has been suggested, bears evidence of an attempt to "expedite" a hearing of the matters complained of as error, upon an application for a mandamus, which can only be corrected upon appeal.

In *ex parte Conn. Mut. Life Ins. Co., 131, U. S., CLXXX* (*appendix*), this Court said:

"Mandamus can only be resorted to *when other remedies fail.* It is an extraordinary writ and should only be used on extraordinary occasions. Here the parties *have ample remedy by appeal.* * * * We cannot, under the state of facts he states, *expedite* the determination of his cause by mandamus."

That is what the petitioners are trying to accomplish

in these cases—to expedite the determination of their cause—when there exists an ample remedy by appeal.

In *ex parte Hoyt, 13 Peters, 290,* Justice Story, speaking for this Court, said:

"A writ of mandamus is not a proper process to correct an erroneous judgment or decree in an inferior court. That is properly matter which is examinable upon a writ of error, or on appeal (as the case may require), to the proper appellate tribunal. Neither can this court issue the writ upon the ground *that it is necessary for the exercise of its own appellate jurisdiction.* * * * It has been repeatedly declared by this Court that it will not, by mandamus, direct a judge *what* judgment or decree to enter in a suit; but will only require him to proceed to render judgment."

Ex parte Newman, 14 How., 165.

That an appeal would lie from any error committed by the court below, in attempting to carry the mandate into execution, will not admit of discussion. That being true, the petitioners have an ample and complete remedy, and having it, cannot have a mandamus.

Suppose the peremptory writ should issue, what would it command, which is not already found in the mandate?

It may be said this Court could issue further directions to the Circuit Court, indicating, in its opinion on this application for the writ, more specific directions than are now found in the decree of this court, its mandate or former opinion what the court below should do.

It is hardly necessary to say that this Court possesses no such power. It has never, as far as I know, attempted to exercise it, but has repeatedly declined to do such a thing.

Wherein the Rugg case differs from that of Latta's.

In the Rugg case, the lease describes a certain tract by metes and bounds. The Hot Springs Commission, in laying out the town, widened the street upon which these lots were situate, and, in doing so, took fully one-half the lot, in depth, and it thereafter became a part of a street. The lots described in the lease were about fifty feet in depth, and ran back to the "Sumpter fence."

The leased property was all *east* of the "Sumpter fence." That which was *west* of that fence had never, so the testimony shows, been in the possession, custody or control of Gaines. To give the lots a depth of ninety feet, the Commission added to the fraction of the leased property, sixty-five or seventy feet, taking the same from the Sumpter tract.

The defendant, Rugg, when the mandate was filed, having previously set up by answer, that the lot, as awarded, was not identical with that described in the lease, asked the Court to direct the master to ascertain how much of the originally leased property was now *in esse*, as a part of the lot in controversy, and how much was originally owned by the Sumpters, so that, in the

event a writ of possession should issue, the writ should be confined to the property described in the lease.

To this the petitioners object, and insist that they are entitled to the whole lot, irrespective of the fact that they had not "made improvement or claimed possession under an assertion of title, by reason of location and settlement," and it is sought, in this form of proceeding, to obtain an expression of opinion from this Court, either that that question is foreclosed, or that the whole of the lot should go to the petitioners.

What we have said in relation to any expression of opinion upon the other phases of this case is equally applicable to this phase.

I do not think the Court will go into the matters presented in this application, or give any direction to the Circuit Court, but if it should, then I desire to call the attention of the Court to some precedents:

In *Walden v. Craig's Heirs, 14 Peters, 147*, the controversy arose over the enforcement of a judgment, in ejectment, which had been enjoined. The Circuit Court enjoined the execution of the judgment, and the Supreme Court reversed it, and by its mandate directed the enforcement of the judgment in ejectment. The mandate, in that case, was couched in the same language as the one now under consideration; that is, it was directed to proceed therein, "*according to law and justice, and in conformity with the opinion of this Court.*"

Upon receipt of the mandate, a question arose as to *what lands* were covered by the judgment in ejectment.

In order to settle the question *of the identity of the land*, and *what* portion was covered *by the judgment in ejectment*, reference was had *to the original pleadings in the action*, the defenses therein set forth. It further appears that the statute of limitations was interposed, and that evidence was taken in support of the issue thus tendered. This the Supreme Court held the court below might well do.

In a similar case, *Walden v. Bodley, 9 How., 34*, the Court held: "On a mandate to put the plaintiff, in ejectment, into possession, the Circuit Court is right in not *extending the possession further than the land originally recovered, though other lands were afterwards drawn in controversy.*"

In *The Santa Maria, 10 Wheat., 422*, there was a decree restoring the property generally, as claimed. The utmost that can be claimed by Gaines is, that there is a general adjudication in his favor. After the mandate was filed in the Santa Maria case, in the court below, *new pleadings were filed*, the object of which was to make certain expenses and advances a lien on the property ordered to be restored by the mandate. To this course of proceeding it was urged that the court below *could not receive new pleadings*, and that its sole power was to enter a decree restoring the libeled property to the person *mentioned in the mandate*. It was further urged that if such charges were proper, they ought to have been brought on the record *before the case went to the Supreme Court*, and having failed in this, that the *Circuit Court was powerless*

to correct the neglect if one had been committed. The Circuit Court allowed the amendments to the pleadings to be made, and took proof in support of the claims. From this action an appeal was prosecuted to the Supreme Court, and disposing of the matter, the Court said:

"The principle laid down in *Rose v. Himley, 5 Cranch, 513*, that upon an appeal from a mandate, nothing is before the court but the proceedings subsequent to the mandate, is undoubtedly correct, *in the sense in which that expression was used, with reference to the doctrine of that case.* But, upon all proceedings to carry into effect the decree of the court, *the original proceedings are always before the court*, so far as they are necessary to determine *new points*, or rights, in controversy between the parties, *which were not terminated by the original decree.* The court may, therefore, inspect the original proceedings, to ascertain the merits, or demerits, of the parties, so far as they bear on the new claims, and must decide, upon the whole examination, what its duty requires. The decree restores the property, *generally* as claimed by the libelant, but *what* the property *is, what its predicament*, and *what* are the means by which it is to be restored, must be ascertained before the court can institute further proceedings."

In *Williams v. Gibbes, 20 How., 535*, the mandate directed the court below to enter judgment not *inconsistent with the opinion.* After the mandate was filed, and before judgment was entered thereon, *a supplemental answer was filed.* To the filing of the answer objection was made,

and it was contended that the court below could only enter a judgment, *in accordance with the mandate*, and that this must be done without the intervention of new pleadings. In speaking of the filing of the *supplemental answer* the Court said:

"We suppose this question rather a matter of practice, than otherwise, resting in the discretion of the Court below, and as a matter of convenience, preparatory to the taking of the account before the master. The answer—and for aught we see, the object in view might have as well have been attained by a petition to the Court stating the fact—was put in for the purpose of bringing to the notice of the Court the matters relied on in the adjustment of the accounts, and by way of the charges deducted from the amount claimed. The proceeding enabled the Court to give, *in advance*, direction to the master in making the settlement, and thereby narrow the grounds of the controversy before him, *and facilitate the hearing.*"

We insist that it is proper for the court below to instruct the Master to make inquiry as to whether the property described in the lease is identical with that which constitutes the lot in controversy.

Respectfully submitted,

JOHN MCCLURE, & A. H. Garland.

For Rugg and Latta.